

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

PAUL PHELPS,

Plaintiff,

v.

MANUEL PEREZ, et al.,

Defendants.

No. 1:22-cv-01406-ADA-SAB (PC)

ORDER REGARDING STATEMENT OF  
DEATH AND VACATING SETTLEMENT  
CONFERENCE SCHEDULED FOR  
NOVEMBER 9, 2023, BEFORE  
MAGISTRATE JUDGE BARBARA A.  
McAULLIFE

(ECF Nos. 22, 27)

Plaintiff Paul Phelps is proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. On September 26, 2023, Defendants' attorney filed a notice of Plaintiff's death on the record. (ECF No. 27.)

Rule 25(a)(1) provides:

If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

In order for the ninety-day period for substitution to be triggered, a party must formally suggest the death of the party upon the record and must serve other parties and nonparty successors or representatives of the deceased with a suggestion of death in the same manner as required for service of the motion to substitute. Fed. R. Civ. P. 25(a)(1); Barlow v. Ground, 39 F.3d 231, 233

(9th Cir.1994). Thus, a party may be served the suggestion of death by service on his or her attorney, Fed. R. Civ. P. 5(b), while non-party successors or representatives of the deceased party must be served the suggestion of death in the manner provided by Rule 4 for the service of a summons. Barlow v. Ground, 39 F.3d at 232-234.

Rule 25 requires dismissal absent a motion for substitution within the ninety-day period only if the statement of death was properly served. Unicorn Tales, Inc., v. Bannerjee, 138 F.3d 467, 469-471 (2d. Cir.1998).

Here, the ninety-day period has not been triggered by the notice because there is no declaration of service or other proof reflecting that there was proper service of the notice on Plaintiff's successor or representative as provided by Rule 4. In the interest of justice, the Court will vacate the settlement conference scheduled for November 9, 2023, and set a deadline for Defendants to comply with the notice requirement.

Based on the foregoing, it is HEREBY ORDERED that:

1. The settlement conference set for November 9, 2023, is VACATED;
2. Within **thirty (30)** days from the date of service of this order, Defendants may file notice of suggestion of Plaintiff's death with the proper service of notice; and
3. If a proper suggestion of death is not filed, the Court will proceed with further scheduling of the case.

IT IS SO ORDERED.

Dated: September 27, 2023

  
UNITED STATES MAGISTRATE JUDGE